Sazali bin Mat Noh v Timbalan Menteri Dalam Negeri & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–55 OF 1998

KC VOHRAH J

15 OCTOBER 1998

Administrative Law *— Remedies — Habeas corpus — Applicant ordered to be detained at rehabilitation centre — Whether applicant should be applying for certiorari — Whether applicant was wrong in applying for writ of habeas corpus*

Preventive Detention *— Detention — Application for habeas corpus — Allegation of breach of fundamental right to personal liberty — Whether applicant was wrong in applying for writ of habeas corpus*

The applicant was ordered to reside at a rehabilitation centre for two years under s 6(1)(a) of the Drugs Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The applicant applied for an order of habeas corpus for his release on the ground that certain mandatory procedures in s 6 of the Act were not observed by the magistrate before the order was made. The respondent objected to the application for habeas corpus on the ground that the application was misconceived in law and that the proper application should be by way of a writ of certiorari to review the decision of the magistrate.

Held, dismissing the preliminary objection:

Although there is no right of appeal for an order made by a magistrate under s 6(1)(a) of the Act, the person ordered to be detained could apply to the High Court for the remedy of habeas corpus to redress any irregularity which adversely curtails his personal liberty. Under s 365(1)(b) of the Criminal Procedure Code (FMS Cap 6), the High Court may direct that any person who is alleged to be illegally or improperly detained be set at liberty.

The existence of an alternative remedy, however convenient, beneficial and effectual does not prevent the issue of a writ of habeas corpus and it is open to the court to examine the legality of the impugned detention. In this case, the applicant was under detention and he alleged that his fundamental right to personal liberty had been breached. There should be no delay in hearing the application and if the detention was found to be unlawful to order his release immediately, and the application should be by way of habeas corpus (see pp 12I, 13B–D, 14I and15A–B); *Ang Gin Lee v PP* [1991] 1 MLJ 498, *Yeap Hock Seng v Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 and *Mohd Faizol bin Mohamad v Magistrate, Magistrate's Court, Kulim & Ors* [1998] 4 MLJ 442 followed.

[**Bahasa Malaysia summary**

Pemohon diperintahkan supaya tinggal di pusat serenti untuk dua tahun di bawah s 6(1)(a) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 ('Akta tersebut'). Pemohon membuat permohonan untuk perintah habeas corpus untuk pembebasannya atas alasan bahawa prosedur mandatori tertentu dalam s 6 Akta tersebut tidak dipatuhi oleh majistret sebelum perintah tersebut dibuat. Penentang membantah terhadap permohonan untuk habeas corpus atas alasan bahawa permohonan adalah salah tanggap di sisi undang-undang dan bahawa permohonan sewajarnya adalah melalui writ certiorari bagi mengkaji semula keputusan majistret.

Diputuskan, menolak bantahan permulaan:

Walaupun tidak terdapat hak merayu untuk satu perintah yang dibuat oleh majistret di bawah s 6(1)(a) Akta tersebut, orang yang diperintahkan ditahan boleh memohon kepada Mahkamah Tinggi untuk remedi habeas corpus bagi mengatasi sebarang luar aturan yang membatasi kebebasan dirinya. Di bawah s 365(1)(b) Kanun Acara Jenayah (NMB Bab 6), Mahkamah Tinggi boleh mengarah bahawa sesiapa yang dikatakan ditahan secara tidak sah atau dengan tidak wajarnya dibebaskan.

Kewujudan remedi alternatif walau betapa mudah, bermanfaat dan berkesan tidak menghalang isu writ habeas corpus dan adalah terbuka kepada mahkamah untuk memeriksa kesahihan tahanan yang dipersoalkan. Dalam kes ini, pemohon berada di bawah tahanan dan ia mengatakan bahawa hak asasi kepada kebebasan diri telah dilanggar. Tidak harusnya terdapat kelewatan dalam mendengar permohonan dan andainya tahanan tersebut didapati tidak sah memerintahkan pembebasannya dengan serta-merta, dan permohonan hendaklah dibuat melalui habeas corpus (lihat ms 12I, 13B–D, 14I dan 15A–B); *Ang Gin Lee v PP* [1991] 1 MLJ 498, *Yeap Hock Seng v Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 dan *Mohd Faizol bin Mohamad v Magistrate, Magistrate's Court, Kulim & Ors* [1998] 4 MLJ 442 diikut.]

Notes

For cases on habeas corpus, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 300–343.

For a case on detention, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1109.

Cases referred to

Ang Gin Lee v PP [1991] 1 MLJ 498 (folld)

Mohd Faizol bin Mohamad v Magistrate, Magistrate's Court, Kulim & Ors [1998] 4 MLJ 442 (folld)

Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 (refd)
PP v Audrey Keong Mei Cheng [1997] 3 MLJ 477 (refd)
R v Governor of Pentonville Prison & Anor, ex p Azam [1974] AC 18 (refd)
Roshidi bin Mohamed, Re [1988] 2 MLJ 193 (refd)
Tg Mohd Shahrizal bin Tg Zainal Abidin Criminal Application No 44–4 of 1998 High Court, Kota Bharu (refd)
Yeap Hock Seng v Minister for Homes Affairs, Malaysia & Ors [1975] 2 MLJ 279 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 25(2)
Criminal Procedure Code (FMS Cap 6) ss 117, 365(1)(b)
Drug Dependants (Treatment and Rehabilitation) Act 1983 s 6(1)(a)
Federal Constitution arts 5(2), 162(6)
Rules of the High Court 1980 O 54
Subordinate Courts Act 1948

Richard Bong (*Bong & Co*) for the applicant.
Zaliha bte Md Janis (Federal Counsel) for the respondents.

Cur Adv Vult

KC Vohrah J: This is a case where the applicant was ordered to reside at Pusat Serenti Karak, Pahang, a Rehabilitation Centre for two years to undergo treatment and rehabilitation for his purported drug dependency. The order was made under s 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the 1983 Act') after an enquiry under s 6.

In the 1983 Act, the officer designated for conducting the enquiry under s 6 is a magistrate.

The application for habeas corpus for the release of the applicant is predicated on the ground that certain mandatory procedures spelt out in s 6 were not observed by the magistrate before the order under s 6(1)(a) was made against the applicant.

The respondents object to the application for habeas corpus on the ground that the application is misconceived in law and that the proper application should be by way a writ of certiorari to review the decision of the magistrate.

There are three other persons applying for their release under the same remedy of habeas corpus on substantially the same grounds, namely the applicants in Criminal Application Nos 45, 46 and 47 of 1998. The respondents in all these three other cases are the same as the respondents in the instant case and they raise the same preliminary objection in the instant case. By agreement of all parties, my decision on the preliminary issue will accordingly be applicable to them.

It is settled law that an order made by a magistrate under s 6(1)(a) of the 1983 Act is not appealable to the High Court nor is the order subject to

revision by the High Court (see the Supreme Court case of *Ang Gin Lee v PP* [1991] 1 MLJ 498). It will be noticed that the power in s 6 is not vested in just anybody but a magistrate, a person trained to be careful with procedures which are provided by law and which need to be meticulously observed. To be noted, however, is that the power is not vested in a court of law and the enquiry officer, the magistrate, is not synonymous with a magistrates' court under the Subordinate Courts Act 1948; the power given to the magistrate in the capacity of an enquiry officer under s 6(1)(a) of the 1983 Act is not found in any provision or any schedule of the Subordinate Courts Act 1948.

The duties placed upon an enquiry officer under s 6 of the Act are onerous as the personal liberty of an individual can be seriously affected if proper enquiry enjoined upon him is not carried out. As was pointed out by Hashim Yeop A Sani CJ in *Ang Gin Lee* (at p 502), the Supreme Court appreciated that the provision of s 6 of the Act is penal in character in the sense that a person can be ordered to reside in a rehabilitation centre for two years to undergo treatment probably against his will but, at the same time, the court also appreciated that it is a provision designed for the rehabilitation of drug dependents. The court viewed the legislation as a social legislation of sort but stressed that it must not be forgotten, however, that the same legislation confers summary powers on the magistrate and can seriously affect the freedom of an individual.

Amongst the duties in the enquiry the magistrate has to meticulously discharge are the duties spelt out in s 6 — to give an opportunity to the individual produced before him to make representation (s 6(1)), to consider a report by a rehabilitation officer on such person (a copy of which shall be supplied to such person and which shall be read out and explained to him), to have regard to the circumstances of the case and the character, antecedent, age, health, conduct, employment, family and other circumstances of the person. And the enquiry officer, while he can accept the certificate of a doctor that the individual is a drug dependant (without proof of the signature of the doctor on the certificate), if the person wishes to prove the contrary, the individual must be allowed to do so (see *Re Roshidi bin Mohamed* [1988] 2 MLJ 193; see also the unreported decision of Mohd Hishamudin J in *Mohd Faizol bin Mohamad v Magistrate, Magistrate's Court, Kulim & Ors* [1998] 4 MLJ 442.

It behoves the enquiry officer not to act mechanically. I am aware that in most cases dozens of individuals are brought before a magistrate, usually in the afternoon, for the enquiry under s 6 and the magistrate is hard pressed to deal with all the cases within a short period of about 2 to 2¼ hours. The magistrate has to make enquiry in respect of each individual and there is always a danger of not following the mandatory procedures under s 6 in each enquiry. If any of the mandatory procedures in respect of a affected person is not adhered to, the order of detention made in respect of such a person is defective. Although there is no right of appeal under the Criminal Procedure Code (FMS Cap 6), it cannot mean that the person ordered to be detained does not have a right of access to the High Court to redress any irregularity which adversely curtails his personal liberty. My view is that he can have recourse to the remedy of habeas corpus.

A It used to be possible under O 54 of the Rules of the High Court 1980, until its repeal in 1993 by PU (A) 192/1993, to apply for habeas corpus in the High Court acting in its civil jurisdiction. Now, such an application has to be done to the High Court in its criminal jurisdiction. Directions in the nature of a habeas corpus are governed under Ch XXXVI of the Criminal Procedure Code. For our purposes, s 365(1)(b) arising under B the Chapter is relevant and reads as follows:

> The High Court may whenever it thinks fit direct —
>
> (1) that any person who
>
> (a) ...
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> C (b) is alleged to be illegally or improperly detained in public or private custody within the limits of the Federation be set at liberty; ... .

This provision is tied to art 5(2) of the Federal Constitution and must be read together with s 25(2) and para 1 of the Schedule to the Courts of Judicature Act 1964 and as modified by art 162(6) of the Constitution. D I shall make reference to all these later but for the moment suffice it to say that s 365, as quoted, relates to a situation where a person is under detention and where it is alleged that the person is illegally or improperly detained in public or private custody within the limits of the Federation.

In the case of a person detained in public custody, the remedy under s 365 is not available to him where he is undergoing a sentence of E imprisonment passed by a court of competent jurisdiction or where he has been detained after arrest under a lawful order of a magistrate, ie he has been detained on a remand order made under s 117 of the CPC by a magistrate (see *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198). To be noted is that in both cases, orders of detention are made by judicial officers exercising functions conferred on F a court of competent jurisdiction; in the case of a sentence of imprisonment, the orders of detention are ordered by the High Court or subordinate courts exercising powers under the CPC, after a finding of guilt and conviction of the relevant offence under a relevant law; in the case of remand, by a magistrate exercising powers under s 117 of the CPC after proper G procedures have been followed (see *PP v Audrey Keong Mei Cheng* [1997] 3 MLJ 477).

In the case of detention under s 6 of the 1983 Act, the detention does not arise from an offence that is created under the provision. Nor does it arise under a remand order. The detention in fact is detention without trial arising from a preventive and rehabilitative order. If proper procedures are H not followed, the person detained has no recourse to have his order set aside since, as was stated earlier, there is no right of appeal to the High Court. But surely if his detention is illegal, then he should be set free and set free promptly and certainly that can be done by seeking a remedy through habeas corpus under s 365 of the CPC.

I As was pointed out by the great judge, the late Abdoolcader J (as he then was) in *Yeap Hock Seng v Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 at p 281:

> The grant of habeas corpus is as of right and not in the discretion of the court as in the case of such extraordinary legal remedies as certiorari, prohibition and mandamus. It is a writ of right against which no privilege of person or place can be of any avail (*R v Pell and Offly* 84 ER 720). The heavy musketry of the law will always be brought to bear upon any suggestion of unlawful invasion or infringement of the personal liberty of an individual in the form of habeas corpus and kindred orders where necessary to grant relief when warranted. It was aptly put in the American case of *State ex rel Evans v Broaddus* 245 Mo 123 at p 140 that at least in times of peace every human power must give way to the writ of habeas corpus and no prison door is stout enough to stand in its way.

Abdoolcader J observed that such then is the purpose and power of this great writ of liberty that he was impelled to the view that the principles governing the exercise of the court's discretion and the rules pertaining to the existence of alternative remedies in granting mandamus, prohibition and certiorari should not apply to habeas corpus. I respectfully agree with his views.

The distinguished judge then commented on s 365 of the CPC, art 5(2) of the Federal Constitution, s 25(2) and para 1 of the Schedule to the Courts of Judicature Act 1964 and the modifying application of art 162(6) of the Federal Constitution, thus:

> My conclusion in this respect is not inhibited or affected by the judicial discretion provision in s 365 of the Criminal Procedure Code that: 'The High Court *may whenever it thinks fit* direct —' and certain Indian decisions on the like provision in s 491 of the former Indian Criminal Procedure Code (now replaced by the Indian Criminal Procedure Code 1973 which omits this section), in view of the fact that the complaint now made by the applicant purports to be one of a breach of his fundamental right of personal liberty under the Constitution and this application must of necessity be made both under the procedural provisions of the Criminal Procedure Code and art 5(2) of the Constitution which must be read together with its enforcement provision enacted in s 25(2) and para 1 of the Schedule to the Courts of Judicature Act 1964. Section 365 of the Criminal Procedure Code must now therefore be read, in my view, in this light and as modified accordingly by the application of the provisions of art 162(6) of the Constitution.

The learned judge examined several cases including the English Court of Appeal decision in the English Court of Appeal, *R v Governor of Pentonville Prison & Anor, ex p Azam* [1974] AC 18 (at pp 24–49), which was affirmed by the House of Lords *sub nom Azam v Secretary of State for the Home Department* (at pp 58–75) and stated in respect of the Court of Appeal decision:

> The Court of Appeal unanimously held that a person is entitled to seek a writ of habeas corpus as of right and is not obliged to rely on the less convenient remedy of appeal or any other alternative remedy provided by statute.

Abdoolcader J emphasized the principle laid down by Lord Denning MR and Buckley and Stephenson LJJ, to the effect that the existence of an alternative remedy however convenient, beneficial and effectual does not

A prevent the issue of a writ of habeas corpus and that it is open to the court notwithstanding to examine the legality of the impugned detention.

Assuming that it may be open to the applicant to seek his remedy through certorari, it is clear the process of applying for the application is time consuming and the remedy discretionary. The case here is one where
B the applicant is under detention and he alleges that his fundamental right to personal liberty has been breached; there should be no delay in hearing the application and if the detention is found to be unlawful to order his release immediately, and the application should be by way of habeas corpus.

When I was about to complete this written judgment, the written
C judgment of Mohd Hishamuddin J in *Mohd Faizol bin Mohamad* was passed to me where the same issue was raised as to whether habeas corpus can be resorted to in a detention ordered under s 6 of the 1983 Act. I respectfully agree with his conclusion that art 5 of the Constitution confers on one who complains of the deprivation of his personal liberty not being in accordance with law and of his being unlawfully detained the right to make an
D application for a writ of habeas corpus. As his Lordship has pointed out, the decision of the magistrate on the s 6 inquiry is not being challenged on the merits but on the complaint that there has been a serious breach of procedure. I respectfully agree with the views; in the hearing the High Court is to determine whether there is a flaw in the exercise of the power of the
E enquiry officer to order detention, whether procedures required by s 6 to be observed before he made the order were indeed observed.

In the circumstances, I overrule the objection of the respondents that the application for the remedy of habeas corpus is misconceived and that the applicant should have is proceeded by certiorari. I rule that the matter
F is properly before me in a habeas corpus application.

Postscript

Since writing this judgment, I have received a copy of the written judgment of Idris J in the case of *Tg Mohd Shahrizal bin Tg Zainal Abidin* Criminal
G Application No 44–4 of 1998 High Court, Kota Bharu where my learned brother came to the same conclusion as Mohd Hishamuddin J and myself (on the same preliminary objection that a person detained under s 6(1) of the 1983 Act cannot proceed by way of habeas corpus) that the person indeed has the right to make application for habeas corpus if he alleges his
H detention was illegal as proper procedures were not followed by the officer ordering the detention.

Preliminary objection overruled.

Reported by Jafisah Jaafar

I